DEC 16 1954

No. 351

LOUISIANA PUBLIC SERVICE COMMISSION,
Appellant,

versus

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal from the United States District Court for the Eastern District of Louisiana.

PETITION FOR REHEARING.

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Assistant Attorney General,
State of Louisiana;
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W. CROSBY PEGUES, JR.,
For the Department of Highways, State of Louisiana, Intervening Plaintiff;
PAUL G. BORBON, JR.,
For American Sugar Cane League of the U. S. A., Inc., Intervening Plaintiff;
LOUIS A. SCHWARTZ,
For New Orleans Traffic and Transportation Bureau and American Turpentine and Tar Company, Intervening Plaintiffs, and American Sugar Cane League of the U.S.A., Inc., Intervening Plaintiff.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

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PETITION FOR REHEARING.

Appellants, Louisiana Public Service Commission; Department of Highways, State of Louisiana; New Orleans Traffic and Transportation Bureau; American Turpentine and Tar Company, and American Sugar Cane League of the U. S. A., Inc., pursuant to Rule 58 of the Revised Rules of this Court, herewith petition the Court for a rehearing of the judgment and decision in this matter rendered on November 22, 1954.

STATEMENT.

This suit was filed by the Louisiana Public Service Commission[1] which is an official agency of the State of Louisiana created by the Louisiana Constitution. The Louisiana Commission sought to enjoin, annul and set aside the report and order of the Interstate Commerce Commission issued in Interstate Commerce Commission Docket No. 31,163 entitled, "Louisiana Intrastate Freight Rates and Charges."

The Interstate Commerce Commission's report and order which are issued pursuant to the Interstate Commerce Act, particularly Sections 13 (3) and (4) of Part I thereof, held that certain freight rates and charges for Louisiana intrastate traffic violate the applicable sections of the Interstate Commerce Act and cause undue or unreasonable advantage or preference as between persons or localities in intrastate commerce and those in interstate commerce, and further cause undue or unreasonable discrimination against interstate commerce.

The Interstate Commerce Commission decision in this matter was a split decision and reflected only the majority opinion. Commissioner Freas dissented from the entire report. Commissioner Clark dissented in part, particularly to the extent that he could not agree that increased rates should be prescribed on sugar and sugar cane, and was joined in this dissent by Commissioners Alldredge and Knudson.

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(1) By and under the provisions of Title 28, U. S. C. A., Sections 1336, 1398, 2284, 2321-25; Title 49, U. S. C. A., Sections 17(9), and Title 5, U. S. C. A., Sections 1001-1009.

The Louisiana Commission exhausted all of its remedies before the Interstate Commerce Commission, its final application for rehearing having been denied. Accordingly the Louisiana Commission filed this suit against the Interstate Commerce Commission. Trial of the case in the lower court was held before a three-judge federal district court on June 5, 1954, and on July 12, 1954 the suit was dismissed.

Thereafter, appellants appealed. Notice of appeal and jurisdictional statement as amended were filed by appellants. Motions to affirm were then filed by appellees. Reply to motions to affirm were filed by appellants, and on November 22. 1954 this Court rendered the following order:

> "PER CURIAM: The motions to affirm are granted and the judgment is affirmed."

STATEMENT OF GROUNDS WHY THIS PETITION FOR REHEARING SHOULD BE GRANTED.

1.

Appellants are accorded by law a direct appeal from this Court from the judgment and decree of the three-judge federal district court below.

See *28 U. S. Code, Sections 1253 and 2101 (b).*

2.

Appellants have presented for review on appeal in this case a matter which requires plenary consideration, with briefs on the merits and oral argument for its resolution.

See Revised Rules of Practice, Rule 15.1 (e).

ARGUMENT.

There is no question that the Act of Congress authorizes appeals direct to the Supreme Court in matters of this kind which are heard and determined by a federal district court of three judges.

The only question which remains is whether or not under the rule-making power of this Court by which Rule 15 was adopted, and particularly Rule 16 under which the Court has set up a procedure for dismissing appeals, the judgment of the lower court should be affirmed without briefs or oral argument.

The official agencies of the State of Louisiana, namely the plaintiff, Louisiana Public Service Commission, and intervenor, Department of Highways, State of Louisiana, as well as other appellants, are disappointed at the action of the Court in this case and particularly at its refusal to permit the matter to be briefed and oral argument presented.

That the case is an important one to the sovereign State of Louisiana is indicated by the fact that it is brought here by the official freight rate-making agency of Louisiana, the Louisiana Public Service Commission, and concurred in by Louisiana's own official Department of Highways. The importance of the case is further demonstrated by the fact that if the judgment is finally affirmed, Louisiana will have lost jurisdiction over some of the most important freight commodities moving in Louisiana intrastate traffic insofar as the freight rate increases of the Interstate Commerce Commission in Ex Parte 168 and Ex Parte 175 are concerned. These commodities are:

Asphalt, 15%; Asphalt-coated rock, sand and gravel, 8% plus 15%; Bagasse, 15%; Brick, common building or face, hollow building tile, 15% (plus 8% if moving east of the Mississippi River); Cement, 15%; Clay and shale cinders, 9%; Cottonseed, cottonseed cake, meal and hulls, 15% (plus 8% if moving east of the Mississippi River); Cottonseed bran, 8% plus 15%; Molasses, 9%; Petroleum products, 9%; Sand, gravel and related commodities, 8% plus 12%; Soybeans, soybean cake and meal, 15% (plus 8% if moving east of the Mississippi River); Sugar, raw and refined, and sugarcane, 8% plus 15%; Sulphur and sulphuric acid, 9%; Tarwood or waste wood 15%.

The Trial Examiner of the Interstate Commerce Commission found that the increase in rates and charges to be paid by Louisiana shippers for Louisiana intrastate freight traffic would be $1,900,000 annually. When the Interstate Commerce Commission affirmed its Examiner it held that the increase would amount to $1,700,000 annually.

The Attorney General of this State, the General Counsel of the Louisiana Department of Highways, and other counsel on whose behalf this petition is filed, believe and sincerely urge that this is a substantial question, not only in dollar amount, which should not be the only criterion, but also in the effect it will have in the future on the rates and charges to be paid in later years on these commodities. Additionally, however, is involved the important question of state sovereignty and the right of Louisiana to regulate its own internal affairs without interference by federal agencies.

The State of Louisiana appeals to this Court to grant it an opportunity by briefs and oral argument to have the matter reviewed properly and not through the per curiam method. All of us are cognizant of Section 13 of the Interstate Commerce Commission, Part I, and know the importance of a national transportation system to all the people of this nation. But it has not been demonstrated by competent evidence in this case, nor has there been a proper judicial review under the principles of *Universal Camera Corporation v. National Labor Relations Board, 340 U. S. 474, 71 Sup. Ct. 456*, which would justify the imposition of the Interstate Commerce Commission order on the intrastate freight payers of Louisiana. The state commissions of many states, including Louisiana, view with a great deal of alarm the usurpation of authority by the Interstate Commerce Commission under the so-called 13th Section procedure of the Interstate Commerce Act, Part I. Louisiana takes particular exception to the Interstate Commerce Commission decision in this case because it is an apparent reversal within a very short period of time by the Interstate Commerce Commission of its own holdings in the previous 13th Section case involving Louisiana which was decided only 10 months before the institution of these proceedings.[2]

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(2) See 284 I. C. C. 467, where the Louisiana Public Service Commission was upheld on the following commodities: Brick, common building or face, and hollow building tile in Louisiana east of the Mississippi River; cattle-feed, consisting of not less than 65% of cottonseed meal and cottonseed hulls or soybean meal, in carloads; cottonseed and cottonseed cake, meal, and hulls in Louisiana east of the Mississippi River; soybeans and soybean cake or meal, in carloads in Louisiana east of the Mississippi River; sand, gravel and related commodities, including asphalt-coated rock and gravel; sugar, raw and refined, and sugarcane.

Louisiana is also aggrieved by the fact that there has never been published a written analysis of the evidence, either by the three-judge court below, or this court. The court below said it had reviewed the entire record, but it is apparent the review was not very thorough because all that was said in the opinion below on the subject is copied herewith as follows:

> "We have considered the entire record which comprises nearly 1,000 pages of testimony and a great number of exhibits. **In the belief that no useful purpose would be served by our reviewing the record here we shall not do so."** (Emphasis ours).

In the per curiam of this Court, we are told only that the judgment is affirmed and there is no review of the evidence.

We are conscious of the tremendous burden which this Court has and the great volume of litigation which is presented to it for review. Nevertheless, it is our belief that the State of Louisiana, appealing through its official agencies and presenting a matter of great importance such as this, is entitled to have the case determined by the entire Court after briefs and oral argument.

Mississippi has fared better than Louisiana in its 13th Section case. Involving substantially the same issues and having been heard about the same time, the three-judge federal district court below, by a 2 to 1 decision, enjoined the Interstate Commerce Commission from its attempt to interfere with and usurp the fixing of Mississippi intrastate freight rates. We attached the opinion of the Mississippi Federal District Court to our reply to

motions to affirm (page 27, et seq.). Louisiana, praying for relief, meets with much frustration its adjacent neighbor, Mississippi, which has secured relief and cannot possibly lose it without having an opportunity to present oral argument to this Court. If on appeal of the Mississippi case the motion to affirm of Mississippi is granted, that state has permanent relief from the Interstate Commerce Commission's actions. If its motion to affirm is denied, the matter is then set down for oral argument. It is our understanding of the revised rules that the lower court decision may not be reversed in such matters without plenary consideration with briefs on the merits and oral argument. So it is not only possible but very probable that Mississippi will win its case and Louisiana lose its case under these peculiar and unique circumstances involving identical issues.

This is true despite the fact that both Louisiana and Mississippi's cases are 13th Section proceedings involving the Ex Parte 168 and Ex Parte 175 rate increases, brought by the Interstate Commerce Commission against the Mississippi Public Service Commission and the Louisiana Public Service Commission and involve rates on many of the identical commodities.(3)

The Court may well imagine how the people of Louisiana feel with Mississippi obtaining injunctive relief against the Interstate Commerce Commission and having

(3) The identical commodities in both the Louisiana and Mississippi cases are: Cottonseed, soy beans, fertilizer, pulpwood, sand and gravel, cement, brick and petroleum.

its case fully heard with plenary consideration, whereas Louisiana has been brushed aside by the district court below in an opinion which did not even analyze the evidence and has finally lost its right of review here by the short per curiam opinion affirming the judgment unless a rehearing is granted herein.

The Court should decide what the limitations are on the right of the Interstate Commerce Commission under the so-called 13th Section proceedings to invade a sovereign state and take away from it its right to fix intrastate freight rates on traffic moving solely to and from points within the State. The Louisiana Commission and its members personally heard the evidence in this case, and personally handed down their opinion fixing the rates and charges. The Interstate Commerce Commission heard no witnesses but sent an examiner to Louisiana who attempted to understand in a three-day hearing the broad questions affecting Louisiana, particularly those relative to the future diversion of traffic from railroads to highway transportation and water transportation which would result from the imposition of those increased rates. The railroads did not bear the burden of proof as they were required to do, and the Interstate Commerce Commission reversed its former position decided only 10 months before the institution of the second proceeding and took over jurisdiction of Louisiana intrastate freight rates on the involved and excepted commodities.

It is a serious matter for a federal agency, such as the Interstate Commerce Commission to take over jurisdiction of local matters which peculiarly belong to an agency

of the State of Louisiana. We do not imply by this statement that the Interstate Commerce Commission has no authority by Section 13 to inquire into the validity of Louisiana intrastate freight rates. But there must be some proper limitation of its authority to come into Louisiana through its examiner and reverse the action of Louisiana's own official rate-making agency, the Louisiana Public Service Commission.

This Court has said in *North Carolina v. United States, 325 U. S. 507, 65 Sup. Ct. 1260*, that there must be a "scrupulous regard" for maintaining the power of the State; that the Interstate Commerce Commission's orders taking over jurisdiction of states' rates must meet "a high standard of certainty"; that before the Interstate Commerce Commission can nullify a state rate, justification for the "exercise of the federal power must clearly appeal." Having this in mind, we cannot understand how this Court in a per curiam opinion could affirm the opinion below and not wish to have presented to it, in a matter so important, briefs on the merits, oral argument and consideration by the entire court of the issues involved. The Court must know of the increased resentment of state commissions and of the states themselves at the invasion by the Interstate Commerce Commission of the rights of the states under the alleged 18th Section authority. **There must be a limitation, a brake placed upon the Interstate Commerce Commission, otherwise the authority of the state commissions will eventually disappear. Only this Court can protect the states, only this Court can find the suitable and proper limitations on the Interstate Commerce Commission.**

The language of the 13th Section is so broad and so general that the Court can only determine after consideration of all of the facts and circumstances whether the federal commission had a right to exercise the authority which it did.

It is not believed possible under the motion-to-affirm procedure for this Court adequately to understand the havoc which is being wrought by the affirming of a decision of this kind. Nor is it possible for the Court to fully comprehend the discriminatory effect that will result from Louisiana losing its case and Mississippi, its neighbor, most probably winning its case.

Louisiana appeals to the Court to grant a rehearing to permit briefing on the merits and to authorize oral argument. If this is done Louisiana will be satisfied that due process of law has been fully afforded. It is confident that a presentation of its case before the entire Court will cause a reversal of the opinion below and an affirmance of the right of Louisiana to determine its local affairs, particularly its right to fix local freight rates and charges where it does not appear from the evidence that there is any discrimination against interstate commerce.

CONCLUSION.

It is respectfully, sincerely and earnestly requested that a rehearing herein be granted, that briefs on the merits and oral argument be authorized and that plenary consideration of this Court be given to the questions in-

volved in this case before its ultimate and final determination.

Respectfully submitted,

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LOUIS A. SCHWARTZ,
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By:.....
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CERTIFICATE.

I hereby certify that the above petition for rehearing is presented in good faith and not for delay.

.....
ROBERT A. AINSWORTH, JR.,
Counsel for Appellants.

CERTIFICATE OF SERVICE.

I hereby certify that a copy hereof has been duly served on all parties of record in the manner and form required by the rules of this court.

.....

ROBERT A. AINSWORTH, JR.,
Counsel for Appellants.